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Matrimonial Jurisdiction

IN

Ontario, and Quebec.

BY

George Smith Holmested, K.C.

1912

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George Smith Holmested

One of His Majesty's Counsel for Ontario

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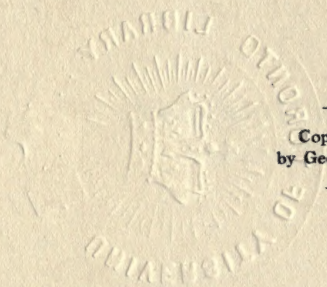

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Matrimonial Jurisdiction in Ontario, and Quebec.

PREFACE.

In a recent work, "The Marriage Laws of Canada," I ventured to call in question the right of the Civil Courts of Quebec to exercise Matrimonial Jurisdiction. In the following pages I have given at length the reasons which induce me to believe, that neither in Ontario, nor in Quebec is there, at present, any Court which can rightfully exercise Matrimonial Jurisdiction. This work is therefore a sort of supplement to the former work, and readers of it will find that, for the proper appreciation of what is here set forth, it is advisable to make themselves familiar with what is said in the work above referred to. If I have come to a right conclusion, it follows that the decrees of nullity of marriage, pronounced by Quebec Courts, which have occasioned some disturbance in the public mind, were pronounced without proper jurisdiction, and are mere nullities.

In this work I have endeavoured to establish the following propositions:—

(1) That the High Court of Justice for Ontario has no matrimonial jurisdiction.

(2) That the Provincial Act, 1 Geo. 5, c. 32, s. 34, purporting to give the High Court such jurisdiction in certain cases is *ultra vires* of the Provincial Legislature.

(3) That the Civil Courts of Quebec have no matrimonial jurisdiction.

(4) That any attempt to give legal effect to the judgments of Roman Catholic Bishops in that Province is a violation of the Act of Supremacy.

In conclusion I desire to say that what follows has been written in the interest of peace and good will, and with a proper sense of the gravity of the matter in hand, and I also hope in such a way that it can give just offence to no one; and although I have stated as plainly and explicitly as I could what are, I believe, sufficient reasons for the conclusion that the Courts, both in Ontario and Quebec, have in matrimonial cases acted *ultra vires* of their rightful jurisdiction, and that in Quebec the result has been a violation of the Act of Supremacy; I hope it will be also manifest that I have no intention of charging any Judges or Roman Catholic Bishops with any wilful violation of that Act, but, at most, with having acted under a mistake of law, and I do not desire to be understood as casting any imputation on their loyalty to His Majesty.

MATRMONIAL JURISDICTION.

Ontario.

Proposition 1. That the High Court of Justice for Ontario has no matrimonial jurisdiction.

In the case of *Lawless* v. *Chamberlain,* 18 Ont. 296, an action was brought in the High Court of Justice to set aside as void a marriage solemnized between the plaintiff, an infant, and the defendant, on the ground that it was brought about by intimidation and threats, and that, although a licence was issued, the plaintiff was a minor and had not obtained her father's consent. The case was tried before the Chancellor of Ontario, who dismissed the action on the merits,* but in giving judgment he said: "To dissolve a marriage once validly solemnized is not of judicial but legislative competence, whereas if the alleged marriage has been procured by fraud or duress in such wise that it is void *ab initio* judgment of nullity may be given by the Court." "Under the English system, matters pertaining to marriage, arising directly between the very parties, were relegated to

*On page 10 of "The Marriage Laws of Canada" I inadvertently stated that the marriage was declared void. That was a mistake. After the word "declared," should be inserted the words "it had jurisdiction to pronounce."

the Ecclesiastical Courts at the time of our adoption of English law. But in litigation touching property and civil rights, when the question of marriage or no marriage arose collaterally or indirectly there was at that time power to deal therewith in Courts other than Ecclesiastical: *Betsworth* v. *Betsworth,* Sty. R. 10."*

The case in hand came within the first category; the question of the validity of the marriage did not arise collaterally or for the purpose of determining the rights of property, but was one for nullity of marriage between the very parties:—The learned Chancellor further states "Where a marriage correct in form is ascertained to be void *de jure* by reason of the absence of some preliminary essential, the action of the Court does not annul, but declares that the marriage was from the first null and void." But it is well settled that a *de facto* marriage which is voidable, may nevertheless become unimpeachable if it is not by judicial sentence annulled in the lifetime of the parties: see *Hodgins* v. *McNeil,* 9 Gr. 305. Therefore the marriage in question, if in fact voidable, would, if not set aside during the lifetime of the parties, have been valid and unimpeachable after the death of either of the parties. This would seem to indicate that a judicial sentence of nullity does in fact annul the marriage, and that a *de facto* marriage, though voidable, is not null and void, unless such sentence is pronounced. The learned Chancellor justified his exercising jurisdiction in the case, on the ground that the Court was empowered to make declaratory judgments, that the inherent jurisdiction of the

*See also *Forbes* v. *Forbes,* 30 O.W.R. 557; *Connolly* v. *Woolrich,* 11 L.C. Jur. 197.

Court extended to all cases of fraud, and to cases in which there is no adequate remedy at law, and also because in the time of the Protectorate when the "Courts Christian" ceased to be, the Court of Chancery in England had exercised this jurisdiction. For this latter proposition two authorities hereafter referred to are cited, neither of which establish that the Court of Chancery ever pronounced a decree of nullity of marriage. The case in Tothill though headed "Divorce" was merely the case of a woman who had been divorced *causa frigiditatis** suing for her marriage portion, and, the father who gave it being still alive, exception was taken to the plaintiff's right of action, the objection being practically a demurrer for want of parties,—and the Master of the Rolls said he would be no formalist,—whatever that might mean. The other authority is an anonymous case (269) in 2 Shower, p. 283. This was an action for alimony and the reporter states, that in the later times they sued for alimony in Chancery, and the Judges were then of opinion that there being no spiritual Courts nor civil law the chancery had the jurisdiction in those days, but now we have Courts Christian the Chancery will allow of demurrers to such bills for alimony. What is said in this note, may be understood by implication to mean that in the days of the Protectorate the Chancery exercised all the jurisdiction of Courts Christian, but all that is actually said, however, is that in those days the Chancery entertained suits for alimony. It will be noted that jurisdiction to grant alimony was expressly conferred on the former Court of Chancery of Ontario by

*By what Court is not stated.

statute, and the High Court exercises that jurisdiction by virtue of express statutory power: Ont. Jud. Act s. 34. The reasoning on which the claim to jurisdiction in *Lawless* v. *Chamberlain* is based, seems to be inconclusive for the following reasons: First, as the learned Chancellor concedes according to the English system matters pertaining to marriage arising directly between the very parties were relegated to the Ecclesiastical Courts. He might have gone farther and stated that such Courts had exclusive jurisdiction in such matters. It must also, we think, be admitted that such matters were regarded as Ecclesiastical, and subject to "The King's Ecclesiastical Law" which (as Chief Justice Tindal declared when delivering the opinion of the Common Law Judges in the House of Lords in *Reg. Millis,* 10 Cl. & F. 534), is part of the Common Law. But it must be remembered that the High Courts of Justice, and its predecessors the Superior Courts of Common Law and Equity, were constituted as Courts of Civil and criminal jurisdiction, and a court of "civil" jurisdiction, one would think, can only exercise such jurisdiction as Courts of civil jurisdiction usually exercised according to the British system. In one particular, viz., that of alimony, the Court, as already remarked, is expressly authorized to exercise a jurisdiction in a matter regarded formerly as a matter of Ecclesiastical jurisdiction; and from the express conferring of this particular jurisdiction, and the silence of the statutes as to all other Spiritual or Ecclesiastical jurisdiction, the inference, I am inclined to think, ought to be, that jurisdiction as to such other matters has not been conferred. The jurisdiction to administer justice in cases where

there is no adequate remedy at law, it is submitted must be taken to apply to civil cases, and not to Ecclesiastical or Spiritual cases. It can hardly be pretended that the High Court can grant decrees of divorce *a vinculo*. The learned Chancellor himself concedes that that is not of judicial competence, and yet whenever a divorce is granted by Parliament it is because there is no adequate remedy at law, which seems to indicate, that the jurisdiction is limited by the way in which the jurisdiction of the English Court of Chancery was also limited, and therefore in spite of what is said in Shower's Report, *supra*, it would not include a matrimonial jurisdiction, which was no part of the civil jurisdiction exercised either by the Courts of Law or Chancery in England at the time of the constitution of our Provincial Superior Courts, whose jurisdiction was to be measured by that of their English prototypes; and the same observations apply to the Court's jurisdiction in cases of fraud, because the fraud must be in matters respecting which the Court as a civil Court has competence to deal. Encouraged no doubt by the views expressed by the learned Chancellor in *Lawless* v. *Chamberlain*, the case of *T.* v. *B.*, 15 O.L.R. 224, was subsequently instituted in which the plaintiff claimed a decree of nullity of marriage on the ground of the alleged impotence of the defendant; but, on the point of law being raised as to the jurisdiction of the Court to entertain the action, the learned Chancellor himself upheld the objection. Now it is hardly necessary to cite authorities to show that the ground alleged, if established to exist at the date of the marriage, was a ground on which the English Ecclesiastical Courts were accus-

tomed to pronounce decrees of nullity. The learned Chancellor cites the dictum of Sir J. P. Wilde, a former President of the English Divorce Court, to the effect that the question of impotency as a ground of nullity has never yet been raised in the temporal Courts of the country (*i.e.*, England) and that such suits have been maintainable in the Ecclesiastical Courts or in the Divorce Courts alone, *A.* v. *B.* L.R. 1 P. & D., 559, 561; but he appears to think that because the marriage would be good until annulled, that that constituted a distinction between the case of duress, as in *Lawless* v. *Chamberlain,* where the marriage was void *ab initio.* But it may be remarked that all decrees of nullity are based on the ground that the *de facto* marriage is void *ab initio.* Impotence is only a ground for nullity where it is proved to have existed at the date of the marriage, physical incapacity subsequently arising is no ground for decreeing nullity. So that the assumed distinction between duress and impotency as a ground of nullity does not really exist. A marriage obtained by duress is only voidable, and it cannot be validly annulled except by judicial sentence. If not annulled, it may become valid and unimpeachable. So also in the case of impotency existing at the date of the marriage, it renders the marriage voidable, but, unless a judicial sentence of nullity is pronounced, it may become valid and unimpeachable.

The case of *T.* v. *B.* therefore looks very like a distinct retreat from the position taken up in *Lawless* v. *Chamberlain,* because, if there was really inherent jurisdiction to pronounce a sentence of nullity for duress, it

is very hard to see why the same inherent jurisdiction did not exist in the case of impotency.

In the case of *T.* v. *B.* the learned Chancellor says that the *ratio decidendi* in *Lawless* v. *Chamberlain,* he thinks, is legislatively recognized by the Ontario Statute, 7 Edward 7, c. 23, s. 8; but may not the opposite conclusion be more properly drawn, from the fact that according to the *dictum* in *Lawless* v. *Chamberlain,* no such Act was needed, as the Court had inherent jurisdiction to do what the Act empowers it to do? Whereas the Legislature seems to have thought it had no such jurisdiction, and therefore the Act was passed in order to confer it.*

In the later case of *May* v. *May,* 22 O.L.R. 559, which was an action by a woman to have a marriage solemnized between herself and the defendant declared null and void because of their being related, as alleged, within the prohibited degrees; Latchford, J., who tried the action, considered himself bound, by the case of *Lawless* v. *Chamberlain,* to hold that the Court had jurisdiction to entertain the action, which, however, he dismissed on the ground of the unsatisfactory nature of the evidence in support of the plaintiff's case; this action was undefended. But on appeal to a Divisional Court, Meredith, C.J.C.P., after referring to the learned Chancellor's dictum in *Lawless* v. *Chamberlain,* said "I think it would be a very great misfortune if it should be held that a jurisdiction, which, formerly at all events, was exercised in England only by Ecclesiastical Courts,—a system which has not been introduced into this country, should be exercised by the High Court." In his opinion the only cases in which the Legislature had authorized the High

*As to the validity of this Act, see *post,* p. 14.

Court to exercise any matrimonial jurisdiction was by the two Acts 7 Edward 7, c. 23 (Ont.), and 9 Edward 7, c. 62, which will be hereafter referred to. He refused to consider that the *dictum* of the Chancellor was intended to apply to such a case as that before the Court, and the appeal was dismissed.

In a still later case of *A.* v. *B.*, 23 O.L.R. 261, the action was for nullity of marriage on the ground that the plaintiff was at the time of the marriage insane, and therefore incapable of entering into the marriage contract. Though the plaintiff was an infant, yet both she and the defendant were over eighteen years, and therefore not within the provisions of R.S.O., c. 162, s. 31, or the amendments 7 Edward 7, c. 23, s. 8 (Ont.), and 9 Edward 7, c. 62 (Ont.). Clute, J., who tried the action, although finding that the plaintiff was in fact insane at the time of the marriage, and that such insanity was a valid and sufficient ground for obtaining the relief asked, yet held, after considering the cases above referred to, that the Court had no jurisdiction, either under the power to make declaratory judgments: Jud. Act, s. 57 (5), or otherwise, to entertain the action, and he accordingly dismissed it.

Mr. Justice Clute does not state the reasons whereby he arrives at the conclusion that the High Court has no jurisdiction in such cases, and therefore what appear to be reasonable grounds for believing that the conclusion which he reached is correct are here submitted. At the time when the Courts of Law and Equity were established in this Province it is a well known fact that according to the English system certain matters had, almost

from the time of the Norman Conquest, been committed to the exclusive jurisdiction of Ecclesiastical Courts, or "Courts Christian" as they were called. Among the matters committed to these tribunals was undoubtedly marriage, and all jurisdiction for annulling marriages or granting divorces *à meusâ et thoro* (*i.e.*, separation from bed and board) and as incidental thereto, the granting of alimony, was exercised exclusively by such Courts. They had also jurisdiction in respect of wills of personalty, and the granting of probate thereof, and also the granting of administration in cases of intestacy. This jurisdiction was exercised by the sanction of the temporal authority, and the law administered in such Courts Christian was never the Canon Law of the Church, as it prevailed on the continent of Europe, but a law no doubt largely founded thereon, but having also distinctive peculiarities of its own, which was known as "the King's Ecclesiastical Law," and as such part of the common law of England: see *per* Tindal, C.J., in *Reg.* v. *Millis,* 10 Cl. & F. 534, at p. 671.

When powers of self government were given to Upper Canada the Legislature of the Province had power to establish courts and to confer on them such jurisdiction as it saw fit. It might have enacted that the courts established should have jurisdiction not only in civil proceedings, but also in proceedings which in England were regarded as Ecclesiastical or within the jurisdiction of "Courts Christian," but we find as a matter of fact it did not do so. It established Superior Courts of Law, and defined and limited their jurisdiction by that of the English Superior Courts of Law on the 5th of December,

1859: see Ont. Jud. Act, s. 25; and it later established a Court of Chancery and limited its jurisdiction by that of the English Court of Chancery as existing on a certain day, viz., 4th of March, 1837: see now Ont. Jud. Act, s. 26. It further gave to this Court the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, to administer justice in all cases where there existed no adequate remedy at law: see Ont. Jud. Act, s. 28; and also the like equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th of March, 1865: see Ont. Jud. Act, s. 29. But in addition to these powers it also gave to the Court of Chancery specifically, jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England: see Ont. Jud. Act, s. 34, which was a jurisdiction that was not exercised by the English Court of Chancery; and if we look at the original Act whereby the Court of Chancery was instituted 7 W. 4, c. 2 (U.C.) we find it was worded as follows: s. 3. "And be it further enacted by the authority aforesaid that the said Court of Chancery shall have the like power, authority and jurisdiction in all cases of claims for alimony, that is exercised and possessed by any Ecclesiastical or other Court in England." The Legislature also conferred the jurisdiction in regard to probate and administration, (in England at that time exercised by the Ecclesiastical Courts), first on the Probate Court of Upper Canada by 33 George 3, c. 8, and afterwards on the Surrogate Courts by 22 Vict. c. 93. If the maxim *expressio unius exclusio alterius,* has any application to the statutes constituting the Superior

Courts of Law and Equity, it would seem to follow that the Legislature did not intend to, and did not in fact, confer on any Courts which it established any more of the jurisdiction exercised by English Ecclesiastical Courts than was specifically mentioned and provided for; and that the notion that it conferred on the Court of Chancery, by implication, as part of its inherent jurisdiction, any matrimonial jurisdiction whatever, or any other jurisdiction such as was exercised by English Ecclesiastical Courts, seems to be without any substantial foundation, notwithstanding what may have been done by the English Court of Chancery in the days of the Commonwealth, which, it must be admitted, was an abnormal period.

Mr. Justice Clute inclined to the opinion, that the power of the High Court to make a declaratory judgment, does not enable it to do so in any case in which it has no jurisdiction over the subject matter in controversy, and there seems to be no reason to doubt that that conclusion is correct. At any rate, of what substantial avail is the declaration of a Court that a marriage ought to be annulled, if it has no power in fact to annul it. Is it not placing litigants like Mahommet's Coffin between earth and heaven: They ought not to be married, but *de facto* they are married, and the marriage is not annulled. What would be the position of such parties as regards the Criminal law if either of them, without any judicial sentence of nullity, should marry some other person in the lifetime of the other?

For these reasons may we not conclude that the High Court of Justice for Ontario has really no matrimonial

jurisdiction, and that the cases in which the Court has assumed to exercise such jurisdiction, were wrongly decided, and any judgments of nullity pronounced by it would appear to be open to serious question as to their validity.*

Proposition 2. That the Provincial Act, 1 Geo. 5, c. 32, s. 34, is *ultra vires.*

Thus far the question has been discussed apart from the Provincial legislation above referred to, and it remains to be considered whether under those Acts the High Court acquired any matrimonial jurisdiction. These Acts 7 Ed. 7, c. 23, and the amending Act 9 Ed. 7, c. 62, have been recently consolidated as 1 Geo. 5, c. 32, ss. 34, 35, and purport to authorize the High Court to annul *de facto* marriages which have been solemnized between two persons, either of whom is under eighteen years, without the consent of parents or guardians, as required by s. 15 of the Act, where the parties have not after the ceremony cohabited and lived together as husband and wife, and the action is brought before the person bringing it has attained nineteen years. The High Court is to have a discretion to refuse relief where carnal intercourse has taken place between the parties before the ceremony,—s. 34 is as follows:—

"34.—(1) Where a form of marriage is gone through between persons either of whom is under eighteen years without the consent required by s. 15 in the case

*I believe there is only one such case.

of licence, or where without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the High Court, notwithstanding that a licence or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorized by law to solemnize marriage, shall have jurisdiction and power in an action brought by either party who was at the time of the ceremony under the age of eighteen years to declare and adjudge that a valid marriage was not effected or entered into.

Provided that such persons have not after the ceremony cohabited and lived together as husband and wife, and that the action is brought before the person bringing it has attained nineteen years.

(2) Nothing in this section shall affect the excepted cases mentioned in section 16, or apply where after the ceremony there has occurred that which if a valid marriage had taken place would have been a consummation thereof.

(3) The High Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

It will be noticed that in this section the words "form of marriage" are used as if to imply that the transaction is a mere form without any substance; but a marriage such as the section refers to does not appear to be *ipso facto* null and void, but would, on the contrary, appear to be merely voidable, and therefore valid until annulled

by judicial sentence: see *Reg. Secker,* 14 U.C.R. 604; *Reg.* v. *Roblin,* 21 U.C.R. 352.*

Such marriages therefore as are contemplated by s. 34 are not necessarily void. Without judicial sentence of nullity they could not be treated as non existing, and unless avoided in the life time of the parties, they would appear to be capable of becoming irrevocable: see *Hodgins* v. *McNeil,* 9 Gr. 305.

By the B. N. A. Act, s. 91 (26), "Marriage and Divorce" are committed to the control of the Dominion Parliament, and it would seem therefore that, after Confederation, all Provincial rights to legislate on such subjects wholly ceased. If a Provincial Legislature can effectually confer a jurisdiction to annul a *de facto* marriage, in the circumstances mentioned in s. 34, *supra,* it is hard to see why it may not also confer jurisdiction to grant divorces. But he would be a bold man who would venture to affirm in the face of the above mentioned provision of the B. N. A. Act that the Provincial Legislatures have now jurisdiction to establish divorce courts. Neither, I think, can it be successfully maintained that the Act referred to, can be brought under the category of matters connected with "The Solemnization of Marriage," which by the B. N. A. Act, s. 92 (12), is committed to the Provincial Legislatures. How can a provision for the dissolution of a *de facto* marriage be in any way regarded as a matter concerning "The Solemnization of Marriage?"

*The marriage in question in this case was subsequently annulled by Act of Parliament (32 Vict. c. 75 printed in the Statutes of 1870).

The Provincial Legislature may make provisions as it sees fit concerning the solemnization of marriage, but is it not clearly trenching on Dominion jurisdiction when it proceeds to establish a Court, or confers jurisdiction on an already existing Court, to dissolve for any cause whatever, an existing marriage? It is submitted that the answer to that question must be in the affirmative. It is therefore somewhat surprising that the Provincial Act in question has not been disallowed.*

Quebec.

Proposition 3. That the civil Courts of Quebec have no matrimonial jurisdiction.

Proposition 4. That any attempt to give legal validity to the judgments of Roman Catholic Bishops is a violation of the Act of Supremacy.

It has been said that jurisdiction in cases of nullity and other matrimonial difficulties has been given to the Provincial Courts of Quebec.† The special provisions of the Quebec Act under which the present system of Civil Law has been introduced are considered hereafter, but, apart from these, the same line of argument that has been applied to the High Court of Ontario appears to apply with equal force to the civil Courts of Quebec.

*I have dealt only with 1 Geo. 5, c. 32, s. 34, but ss. 29-33, having regard to the B. N. A. Act, ss. 91 (26), 92 (12), appear also open to question.

†See Gemmill on Divorce, p. 43, cited by Boyd, C., 15 O.L.R. at p. 226.

At the time of the conquest of Canada the law as to the creation of Spiritual Courts as it has been settled by the cases of *Long* v. *The Bishop of Cape Town,* 2 Moo. P. C. (N.S.), 411; *Bishop of Natal* v. *Gladstone,* L.R. 3 Eq. 1; and *Re the Bishop of Natal,* 3 Moo. P.C. (N.S.), 115, appears to have been as follows: Until the grant of powers of self government to Canada the Crown had the right to appoint a Bishop with power to exercise the ordinary functions of a judge in spiritual causes; but as soon as the right of self government was granted to the new colony, the Crown ceased to have the right to appoint or establish an Ecclesiastical Court without the sanction of Parliament. The Anglican Bishop of Quebec was appointed by letters patent from the Crown in 1793; the Anglican Bishop of Toronto was also appointed by letters patent from the Crown in 1839 and the Anglican Bishop of Montreal was also appointed by letters patent from the Crown in 1850; but all of these Bishops, having been appointed after the grant of the right of self government to the people of Canada, acquired no judicial jurisdiction, and could only do so by means of an Act of the Legislature of Canada. But if none of these Bishops, though appointed by the Crown itself, had jurisdiction to exercise the office of the King's Ecclesiastical Judge in Canada, it can hardly be pretended for a moment that Roman Catholic Bishops who have never received any such appointment or official recognition as the King's Ecclesiastical Judges, can have any right or authority whatever to exercise any of the judicial powers which only the King's Ecclesiastical Judge has any right or authority to exercise.

Any authority which they may have been recognized by the Quebec Act to possess, and which that Act may have continued to them, is not a general Ecclesiastical jurisdiction, or a judicial jurisdiction of any kind which can be exercised so as to affect the civil status of any of the King's subjects.

Prior to Confederation the Provincial Legislature had power to confer on the Provincial Courts of that Province a matrimonial jurisdiction as was in fact done in the Maritime Provinces, but can it be said that it did so?

Sec. 8 of the Quebec Act provided that in matters relative to property and civil rights the law previously existing in Quebec should govern and should be the rule for decision in respect of those matters, in the Courts of Justice *to be constituted;* and sect. 17 provided that nothing in the Act contained should prevent the constitution of Courts of Civil, Criminal, and *Ecclesiastical* jurisdiction by letters patent. This, it is to be noticed, expressly recognizes Ecclesiastical jurisdiction as distinct from civil jurisdiction.

It seems to have been assumed by judges of the Province of Quebec that a general matrimonial jurisdiction has been conferred on the Civil Court. In Lower Canada at the time of the Conquest marriage was, according to French law, as it was also according to English law, the subject of Ecclesiastical jurisdiction, and the Civil Courts had no power to annul marriages. If we look at the earlier or the later Statutes establishing the various Courts of first instance in Quebec we find they are constituted Courts of Civil and Criminal Jurisdiction. Thus s. 3052 of the R.S.Q. says, "The Courts of the Province,

in *Civil, Criminal* and *mixed matters* are," and it then proceeds to enumerate all the various courts of the Province. This section therefore constitutes a sort of key note to the Statute constituting all the Provincial Courts, they are Courts for Civil, Criminal or mixed matters, but they are not in any sense Ecclesiastical Courts, nor are they endowed with any Ecclesiastical jurisdiction, nor with any jurisdiction that was formerly Ecclesiastical. "Mixed" matters, it is submitted, are matters which may be partly civil and partly criminal, but would not include matters of Ecclesiastical jurisdiction.

It was, of course, competent for the Provincial Legislature before Confederation to select any matters which under the former regime were of Ecclesiastical jurisdiction, and confer jurisdiction in such matters on the Civil Court, but unless it did so in terms, the constitution of a Court of Civil Jurisdiction would not, it is submitted, by implication mean that such court was also empowered to exercise what was at the time of its constitution regarded as a matter of Ecclesiastical jurisdiction. And when we come to reflect on the matter, the propriety of the conclusion is enforced by the fact, that the giving of a Court an Ecclesiastical jurisdiction by implication without explicitly defining the law it is to administer would be an anomalous proceeding, which it is hard to believe any British Legislature would be guilty of. For if we are to assume that the conferring of a Civil Jurisdiction implies that what was theretofore an Ecclesiastical jurisdiction is also to be exercised, it at once becomes important to know in the exercise of that jurisdiction what law is to be followed. Is it to be the Pope's

Ecclesiastical Law or is it the King's? and on this point, assuming Ecclesiastical jurisdiction was given to the Civil Courts of Quebec, we are left altogether in the dark. It would seem according to some of the decisions hereafter referred to, that in the opinion of some of the learned judges of Quebec whenever a Roman Catholic is concerned the Pope's Ecclesiastical Law and the Pope's Ecclesiastical Courts are to determine the question. But that such is really the effect of the Statute constituting Quebec Courts, would seem to be highly improbable, in that it would be an indirect invasion of the Royal Supremacy, and would be in effect subjecting His Majesty's Roman Catholic subjects in Quebec to papal jurisdiction, contrary to a fundamental principle of the British Constitution, and to the explicit provisions of the Quebec Act, 14 Geo. 3, c. 83,* which of course it is not possible for any Colonial Legislature to over-ride or subvert. Roman Catholics may entertain as a theory, or speculative opinion the doctrine of papal supremacy, but no Provincial Legislature has any power to compel them to submit to that supremacy, or to compel them in any way to acknowledge or be bound by it. A Roman Catholic is just as much entitled to the benefit and protection of the Royal Supremacy as any Protestant, and no Provincial Legislature has any power to take that protection away from him, directly or indirectly, it being clearly a matter to which the Colonial laws validity Act

*Sect. 5 grants to Roman Catholics of Quebec the free exercise of their religion "subject to the King's Supremacy declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the Dominions and Countries which then did or thereafter should belong to the Imperial Crown of this Realm."

would apply: see Holmested's Marriage Laws of Canada, p. 33.

It might be thought that all Roman Catholics are only too eager to submit themselves to the jurisdiction of His Holiness the Pope; and so far as they choose to do so voluntarily they may; but occasions may arise when even Roman Catholics, as in the *Guibord* Case, may desire to avail themselves of the King's justice, and of that right they cannot lawfully be deprived except by the Imperial Parliament.

There have been several cases in Quebec in which the Superior Court has exercised a matrimonial jurisdiction and assumed to pronounce sentences of nullity, but in none of them does it appear that the jurisdiction of the Court to entertain such cases has ever been seriously raised and argued. Both Bench and Bar appear to have taken for granted that the jurisdiction existed, and their procedure is claimed to have been guided by what was the Old French law, prior to the conquest of Canada, namely, that the Civil Court should accept as legally binding on it, the sentences of the Ecclesiastical Courts in such matters. But there is this vital difference in the situation resulting from the conquest which the learned judges in Quebec appear to have altogether signally failed to appreciate, viz., that both the French and English Ecclesiastical Courts whose sentences had legal force and effect, and as such were recognized by the temporal Courts were the sentences of tribunals recognized by the temporal rulers, by whose consent and authority they exercised jurisdiction; and whose tribunals were in short, part and parcel of the recognized system

for the administration of justice, and their judgments needed no supplementary decrees or judgments of any Civil Court to give them full effect: see Pothier *Traité du Contrat de Mariage,* Part VI., c. 1, Art. 2.

When the Conquest took place all French Ecclesiastical Courts ceased to have any status as part of the machinery for the administration of justice; they became, as did the church Courts of all other parts of the Christian Church mere domestic tribunals having no power or authority whatever as a recognized part of the system for administering justice, or determining the status of parties, but having only a persuasive, but no coercive authority over those who voluntarily chose to submit to them.

Sec. 5 of the Quebec Act is the only clause under which the exercise of any kind of jurisdiction can be claimed by the Roman Catholic Bishops. That section secured to Roman Catholics the free exercise of the religion of the Church of Rome subject to the King's Supremacy as established by 1 Eliz., c. 1. The latter Act prevented the Pope or any foreign tribunal from having any jurisdiction which could affect the civil status of any of the King's subjects. In the free exercise of their religion Roman Catholics have a perfect right to regard marriage as a "Sacrament," and, if they see fit, they are entitled to observe those impediments to matrimony which the Roman part of the church chooses to prescribe, in addition to those prescribed by the temporal law, 32 Hen. 8, c. 38; but such additional impediments have gained no legal or temporal sanction from, or by reason of, the Quebec Act. A Roman Catholic

may subject himself to Ecclesiastical censure or discipline for breach of such an Ecclesiastical law of his church, but until that law has also been adopted by the temporal power, its breach creates no legal liability, and a marriage could not be lawfully annulled merely for breach of an Ecclesiastical law which has not received the sanction of, or been adopted by, the temporal power.

The jurisdiction which prior to the Conquest had been exercised in Canada by Ecclesiastical Courts with the sanction of the State might conceivably have been conferred on a temporal or a Spiritual Court, but the jurisdiction must have been, it is submitted, conferred specifically and with explicit provisions as to the law the tribunal was to administer, having due regard to the grave question of the Royal Supremacy, which lies at the root of the whole matter.

But it cannot be pretended that any such specific delegation of Ecclesiastical jurisdiction to any civil Court of Quebec, is to be found in any statute nor that it has been anywhere laid down, that any civil Court is to be bound to give temporal effect to the decrees of any Ecclesiastical tribunal whatever. It is true the Code Civil, cap. 4, contains certain provisions concerning the grounds on which the validity of marriages may be attacked and sentences of nullity be pronounced, but it does not say that any civil court is to exercise such jurisdiction or to administer that law. That may be thought inferentially to give the civil Court jurisdiction, but it is submitted that it does not. It is no doubt an anomalous state of things, that a law should exist and yet there be no tribunal to enforce it, or carry it into effect; but it

did as a matter of fact exist in Upper Canada in regard to equitable rights, before the establishment of the Court of Chancery. And it is submitted for the reasons already given that it still exists in Ontario, where it is against the law to marry within the prohibited degrees, and yet there is no Court to enforce or give effect to that law, and the same state of things exists also in Quebec. But even if Chapter 4 of the Code should be held to give a civil Court jurisdiction to annul marriages for the causes specifically mentioned in that chapter, it must be some civil Court to which has been assigned this particular Ecclesiastical jurisdiction, and to no existing civil Court has such assignment been made, that I can find.* Such being the case, the course of decision in Quebec might seem somewhat surprising, but for the fact that almost every case has been undefended, and the Bench has therefore been deprived of that assistance from the Bar which it might otherwise have had.

In *Dorion* v. *Laurent,* 17 L.C. Jur. 324, which was a suit by a wife for nullity on the ground of impotence on the part of the husband (decided in 1843 but not reported till 1873). It appears that the husband was ordered to submit to a medical examination but refused to do so. He did not appear and judgment was pronounced by default by (as the reports states) "the Pro-

*It may be observed that these provisions of the Code having been enacted prior to Confederation are not open to the objection that they are beyond the jurisdiction of the Provincial Legislature.

vincial Banc du Roi,"* (St. Real, C.J., Rolland, Gale and Day, J.J.). The case is reported as a decision of the Court of Appeal, but it does not appear from the report what the Court of Appeal (Stuart, C.J., and Bowen, Stewart, Heney, and Bedard, J.J.) did in the matter, or how it came before them. But the reporter makes this note. "Cette cause jugée par la plus haute cour du pays établit une jurisprudence qui ne peut etre affectée par une ou deux décisions de premiere instance, ou la cour a deféré ces questions d'impuissance a l'autorité ecclesiastique pour faire prononcer prejudiciellement l'annulation du lien sacramental. J.D."

Notwithstanding the supposed superior authority of this case we find in the case next to be mentioned the Court again deferring its decision until an Ecclesiastical tribunal has first pronounced on the question. This case is *Lussier* v. *Archambault,* 11 L.C. Jur. 53, a case by a husband for nullity of marriage against his wife on the ground of alleged impotence. This case it appears was decided in 1848, but was not reported until 1867. The marriage took place in 1826, and the suit was not brought until twenty-one years afterwards, and the wife did not appear or defend the action.

The cause was heard before the Court of Queen's Bench (Rolland, C.J., and Day and Smith, J.J.), and the Court came to the conclusion that the parties being "Catholics" the civil tribunal had no power to pronounce a decree of nullity of marriage before an Ecclesiastical

*It will be noticed that the case is said to have been decided in the King's Bench, although at the time of the alleged decision it must have been the Queen's Bench.

Court had previously declared the sacrament* to be null —and it appears that a decree of Monsgr. Bourget, the Roman Catholic Bishop of Montreal, declaring the marriage to be invalid, being subsequently produced, the Court gave judgment annulling the marriage in accordance therewith. Another matrimonial case is to be found in the same volume, viz., *Vaillancourt* v. *Lafontaine,* 11 L.C. Jur. 305. This case occurred in 1866, and was heard before Polette, J. The suit was by the husband for nullity of marriage on the ground that the defendant was his deceased wife's sister. The defendant admitted the facts; the Judge declared that it only appertained to the competent Ecclesiastical authority to pronounce on the validity of the marriage, and that it was only competent for the Court to pronounce as to its civil effects if, and when it is declared null by the Ecclesiastical authority. And in this case also the Court deferred pronouncing judgment of nullity until a decree had been produced from the Roman Catholic Bishop of Three Rivers annulling the marriage. The learned Judge affirmed that it pertains to the Ecclesiastical authority to annul marriages, but he erroneously assumed that "The Ecclesiastical Authority" is necessarily that of the Roman Catholic Church where the parties are Roman Catholics; and inferentially, that some legal status has been impliedly conferred on the Ecclesiastical tribunals of that part of the Christian church by the Legislature of Quebec. In other words that Papal laws and Papal jurisdiction have been introduced into the jurisprudence of Quebec by a sort of side wind contrary to the Statute 1 Eliz. c. 1.

*See note *post,* p. 51.

In *Burn* v. *Lafontaine,* 17 L.C. Jur. 40, it was held (by Torrance, J.) that a voidable marriage between parties related within the prohibited decrees is good until judicially annulled, and that a second marriage could not be validly contracted by either party before such annulment. Another case of *Burn* v. *Lafontaine.* (But whether it is the case above referred to is hard to say) is to be found in 4 Rev. Leg. 163, from which it appears that the ground of invalidity in that case was that at the time of the marriage the defendant was already married to another woman then living, the Court, (Torrance, J.), found the case proved, and without requiring any sentence from a spiritual Court annulled the second marriage. This case was all the more remarkable, in view of later decisions, for the fact that the learned judge held the first marriage to be a valid marriage, notwithstanding, that although both parties to it were Roman Catholics, it had been solemnized by a Presbyterian Minister. In this case though the defendant appeared in the suit, he nevertheless does not appear to have raised any question as to the jurisdiction of the Court.

In *Laramée* v. *Evans,* 17 L.C. Jur. 235, which was heard by Papineau, J., in the year 1880, the same question was brought up, and differently decided. The suit was for nullity of marriage on the ground that both parties being Roman Catholics, the marriage in question had been solemnized by a Presbyterian Minister. The plaintiff claimed that the validity of the marriage should be referred to the Roman Catholic Bishop of Montreal for his judgment as to the validity of the marriage, and to this part of the claim the defendant demurred, on the

ground that the Roman Catholic Eccelsiastical authorities had no power to pass upon the validity of a marriage celebrated by a Protestant Clergyman. According to the report of the case, the learned Judge held as follows:

(1) That in the Roman Catholic Church, of which the full, entire, and free exercise is recognized by our laws, marriage is a spiritual religious tie, and a sacrament, *over which the Superior Court has no jurisdiction.*

(2) That the law of Quebec has not established civil marriage ("Mariage Civil,") but that it gives civil effects to a religious marriage validly celebrated by curés and ministers regularly ordained, according to the rites of their respective churches, and authorized to keep registers of births, baptisms, marriages and burials.

(3) That the Superior Court, where two Roman Catholics have been married by a Protestant minister, has the power to refer to the Roman Catholic Bishop of the diocese of the parties the decision of the question of the validity or nullity of the spiritual and religious tie of their marriage, in order that, after his decision, shall have been reported to the Court, it may pronounce upon the civil effects resulting from the validity or nullity of such a tie.

(4) That according to the jurisprudence of the country the sentence of the Roman Catholic Bishop, regularly pronounced, and deciding as to the validity or nullity of the spiritual and religious tie of marriage between Roman Catholics, can and ought to be recognized by the Court.

The learned judge supports his judgment by a careful and elaborate statement of his reasons; but

with all due respect, it is submitted in some particulars the conclusion at which he arrived, was erroneous.

With regard to the first proposition it may be remarked that if followed out to its legitimate conclusion, it establishes the very position which is sought here to be maintained, viz., that marriage being as admitted "A spiritual and religious tie and sacrament," it is a matter over which the Superior Court of Quebec has no jurisdiction; but notwithstanding this fundamental admission, the learned judge by this self same judgment proceeds to exercise jurisdiction, and holds that though he has no jurisdiction he has a right to refer the question to another tribunal. With the learned judge's second proposition above mentioned, no fault can be found. By his third proposition which is in direct conflict with his first, the learned judge affirms that although the Superior Court has no power over marriage, yet it has power to refer the question of the validity of a marriage of Roman Catholics to the Roman Catholic Bishop of the diocese where the parties reside. The learned judge says, "The case presents a *spiritual question which it is incompetent for the Court to adjudicate seeing that its jurisdiction is purely civil,* but on the determination of this spiritual question depends the rights which fall under its (that is, the Civil Court's) jurisdiction." And he asks if the Civil Court can and ought to refer this question, he will not say to a competent expert, but to competent authority in this matter. And he comes to the conclusion that the Court can, and ought to do so, and that the Roman Catholic Bishop is this "Competent Authority."

It is submitted, however, that the proper conclusion from the learned judge's premises, namely, that his Court being a purely Civil Court, and exercising merely a civil jurisdiction, it had no matrimonial jurisdiction, is this, that he had no authority to refer the question to anyone whomsoever or in any way to deal with, or adjudicate in the matter. If he had no jurisdiction,—then he had no jurisdiction to refer the matter to a third person; and if he had jurisdiction,—he had equally no jurisdiction to delegate to another his judicial functions, it being a well recognized maxim of law that *delegatus non potest delegare*—see Broom's Leg. Maxims 8th Ed., p. 655.

The learned judge, it will be found, finds in some expressions in the judgment delivered by the Privy Council in the *Guibord* case what he conceives to be a justification for holding that the Roman Catholic Bishop is the proper functionary to determine the matter. But the learned judge appears strangely to have misconceived the words from the judgment which he cites. It is well, in the first place, to recall the facts of that case known as *Brown* v. *Curé of Montreal,* L.R. 6 P.C. 157. The proceeding was originally instituted by the widow of a man named Guibord, she died during the proceedings, and it was continued by her representative. The object of the suit was to compel the Roman Catholic authorities of Montreal to admit the body of the deceased Guibord to burial in the consecrated part of the Roman Catholic cemetery. The curé refused burial in the consecrated part of the cemetery, but offered burial in the ground appropriated to unbaptised persons and criminals. The suit therefore involved to a certain extent the claim of the

deceased and his representatives to a civil right, namely, the right of sepulture for the remains of the deceased.

It appeared by the evidence that the deceased was a Roman Catholic, and had been connected with some society which was disapproved by the Roman ecclesiastical authorities, and although he had been admonished by them to refrain from associating therewith he had disregarded their monitions. Into the merits of the dispute, or of the conduct of the deceased it is not necessary here to inquire. He may have been deserving of excommunication, or he may not; all that is necessary here to state is that before his death he was not in any way tried by any church Court, or subjected to any sentence of excommunication; and, however faulty or erroneous his belief or opinions on questions of faith may have been, he died a *de facto* Roman Catholic, and as such *prima facie* entitled to burial in consecrated ground with the rites of the church. That being the case the Judicial Committee came to the conclusion, that it was too late after his death, for the ecclesiastical authorities to try him and condemn him; and as a matter of fact he could not then be excommunicated because he was beyond the pale of the church militant here on earth. This case was, as usual, when any question of religion is at stake, the occasion of much bitterness between the contending parties, but viewed in the calm light of reason, justice, and good sense, the manifest justice of the decision of the Privy Council must commend itself to all reasonable and fair minded men. For surely no one, be he a Roman Catholic or a Protestant, would like to be tried and condemned unheard, or to be tried and condemned after his death

which is the same thing; because that is plainly contrary to natural justice. The experience of mankind is that many cases which look perfectly clear from one point of view, when you come to hear the other side are often found to wear a very different complexion, and the real opinions and beliefs of men may in fact be found to be very different from what they appear to be. But it is not necessary further to discuss that point, it must suffice to say that the pith of the decision in the *Guibord* case was, that it was against natural justice to condemn a man unheard, or after he was dead, and that such a course cannot be justified by any law of the Roman Catholic Church reasonably interpreted; and this is certainly very much to the credit of the law of the Roman part of the church. But in order to arrive at this conclusion it was necessary, of course, for the Court to inquire into the action of the Roman Catholic authorities in regard to the deceased, and into the laws by which that part of the Christian church is governed. Guibord was a Roman Catholic, and subject to the laws of the Roman Catholic Church, and by those laws, properly and reasonably construed, he was bound as regards his rights as a member of the Roman Catholic church; and it was only for that reason necessary to inquire what was the Ecclesiastical tribunal to which the deceased was subject, and it was in that view only that the words cited by Papineau, J., from the judgment of the Privy Council were used.

The point is very clearly stated in Halsbury's Laws of England where it is said:—

"So far as the discipline of a church is concerned it cannot externally affect any person except by the express

sanction of the civil power, or by the voluntary submission of the particular person: *Middleton* v. *Crofts* (1736), 2 Atk. 650, 665; but for the purpose of enforcing discipline within the church, any religious body may constitute a tribunal to determine whether the rules of the body have been violated by any of the members or not, and what shall be the consequence of such violation: *Long* v. *Cape Town,* 1 Moo. P.C. (N.S.), 411, 461. The decision of such tribunal will be binding, and will be enforced by the courts of law, when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, if not, has proceeded in the manner consonant with the principles of justice: *Long* v. *Cape Town, supra;* but if any member of such a body has been injured as to his rights in any matter of a mixed spiritual and temporal character, the Courts of law will, on due complaint being made, inquire into the laws and rules of the tribunal which has inflicted the injury, and will ascertain whether any sentence pronounced was regularly pronounced by competent authority, and will give such redress as justice demands: *Murray* v. *Burgess* (1866), L.R. 1 P.C. 362; *Brown* v. *Curé* of Montreal, 6 P.C. 157:" Halsbury's laws of England, Vol. 11, p. 366, s. 698.

To these authorities may be added the following cases where different religious Christian denominations were concerned: *Cooper* v. *Gordon,* L.R. 8 Eq. 249, (Congregationalists); *Dean* v. *Bennett,* L.R. 9 Eq. 625, *Atty.-General* v. *Etheridge,* 32 L.J. Ch. 161, (Baptists); *General Assembly* v. *Overtoun* (1904) A.C. 515, *Attorney-General* v. *Christie,* 13 Gr. 495; *Attorney-General* v.

Jeffrey, 10 Gr. 273, (Presbyterians); *Attorney-General* v. *Anderson,* 58 L.T. 726, (Presbyterians and Independents); *Dorland* v. *Jones,* 7 Ont. R. 17, 12 Ont. App. 543, 14 S.C.R. 39, (Quakers); *Pinke* v. *Bornhold,* 8 O.L.R. 575 (Lutherans); *Itter* v. *Howe,* 23 Ont. App. 256, (United Brethren). And *Fuzal Karrin* v. *Haji Mowla Buksh,* 18 Ind. App. 59, (Mohamedans).

But the learned authors of the work already cited go on to say, "s. 699, The civil power while thus exercising complete control over all states and degrees, whether they be ecclesiastical or temporal, and affording all necessary protection from wrongful acts, refrains from exercising any purely spiritual functions, and save in so far as positive law may otherwise provide, recognizes and has always recognized the right of all to follow the dictates of their consciences in the religious opinions which they hold:" Halsbury's Laws of England, Vol. 11, page 367.

The words quoted by Papineau, J., from the *Guibord* case, are these, "It must, however, be remembered that a Bishop is always a *judex Ordinarius,* according to the Canon law; and according to the general Canon law may hold a court and deliver judgment if he has not appointed an official to act for him. And it must be remembered that unless such sentences were recognized there would exist no means of determining amongst the Roman Catholics of Canada, the many questions touching faith and discipline which upon the admitted Canons of their church may arise amongst them." But let us suppose that instead of the rights of a Roman Catholic *qua* Roman Catholic, it had been the rights of a member of

the Independent Order of Foresters, or of a Trade Union, or any other voluntary society which had been in question; the Court would have had to proceed in the same way, and would have used similar language. It would have said, "those to whom the duty of governing and ruling the society is committed are the proper functionaries for determining the rights and obligations of the members of the order *inter se;*" and that is all the Privy Council could have meant or intended by the words cited, namely, that among Roman Catholics, according to their private law governing their society, the Bishop is a recognized judge. But the learned judge (Papineau, J.), makes the following comment on the words above quoted, he says, "It is objected that there is no Ecclesiastical Court regularly established recognized by law in the country; *it is true,* but that is not necessary. The Bishop is always the ordinary judge in Ecclesiastical matters when he has not named an official to act in his place. And his authority, in that respect has been recognized by the highest tribunal of the Empire in the following terms,"—giving the above quotation from the judgment in the *Guibord* case. But it may be observed that it is one thing to hold that a Roman Catholic Bishop is a judge ordinary for the administration of the private law of Roman Catholics *inter se;* but something quite different to allege that those Bishops have the status of judges recognized by law as part of the system for administering justice in the Province of Quebec for the purpose of defining the status of Roman Catholics as citizens of the State. To accord to such bishops any such function could only be done by the Imperial Parliament, and for this

reason; all the rights accorded to Roman Catholics in Canada whether by treaty or statute are subject to the Royal Supremacy, and any attempt to give Roman Catholic bishops a judicial status in any part of the Empire would be an infringement of that fundamental principle. This principle of the Royal Supremacy is by some supposed to date from the Reformation era, but anyone who will make himself familiar with the Statutes of the Realm in the pre-Reformation period will find it is one that has been constantly asserted, and is an inherent principle of the British constitution. It is regarded with dislike because in the Reformation era extravagant and indefensible claims were made regarding it. Henry VIII. in particular, and perhaps some later sovereigns, seemed to think they were endowed with spiritual powers which entitled them to dictate the religious faith of their subjects. They appeared to think that they were somewhat in the position of lay Popes. But these extravagant and untenable notions have long since been laid aside and abandoned. No modern Sovereign of England has had any such ideas, nor indeed would they be tolerated by, or could they be enforced against, any section of the community. The Royal Supremacy, as now understood, is an altogether beneficent doctrine, and secures to all subjects of the Empire a right to the King's Justice, and that quite irrespective of the creeds they profess.

The Christian Church in Canada, though unhappily divided into many fragments, has yet many points of substantial agreement. All parts of it are in precisely the same position with regard to the State. The State does not in any way pretend to be a judge as to the relative

merits of conflicting religious opinions or creeds. It interposes no barrier to the entertainment of any beliefs or opinions which are consistent with a decent regard for the feelings of others, and which are not inconsistent with Christian morality, and good order and decency, and the Supremacy of the Sovereign. In short, the whole Christian Church in Canada by whatever names the members thereof may designate themselves, is in just the same position as the primitive church was in in the Roman Empire before the age of Constantine, and after persecution had ceased. Owing to the manifold divisions in the Church, the State is unable to designate, with acceptability to the community in general, any particular Ecclesiastical Court which shall determine questions of a Spiritual or religious character which affect matters in which the whole community is concerned. Marriage is notably one of these questions. To commit such questions to the Ecclesiastical Courts of one particular part of the Christian Church would not be satisfactory to other parts, and to commit such questions to the Courts of each part of the Church would only end in chaos. Marriage is a matter which concerns not only the individuals as members of the Christian Church, or other religious organizations, it concerns their status before the law, and the legal obligations and duties which the status of husband and wife involves, and besides, it concerns the rights of third parties, namely, the issue of the marriage, and on this point the remarks of Jetté, J., in the case of *Laramée* v. *Evans,* 25 L.C.J. 266, are in point.

"Marriage n' interesse pas seulment les parties elles-mêmes; il est la source de la famille, la condition de la

légitimité des infants, il modifie la capacité de la femme, il affecte souvent le credit du mari, etc., a tous ces points de vue il interesse la societé elle-même, qui dès lors, a la droit de le connaitre," all of which constitutes a convincing reason why the jurisdiction to determine the status of marriage should not be committed to any private irresponsible tribunals whatever; and when the word "irresponsible" is used, irresponsible to the temporal authority is meant; to commit these rights to the judgment of irresponsible Ecclesiastical tribunals has never been done in the history of England. The King's Ecclesiastical Courts have always, both before and since the Reformation, administered the King's Ecclesiastical law, and the actions of these Courts were subject to the supervision of the Superior Court of law, and they were prevented by prohibition from exceeding their rightful and proper jurisdiction.

All this is consistent with the Royal Supremacy, and the due administration of justice. But in Canada such a system does not seem feasible, and the only alternative therefore is to do, as in the last century was done in England, and establish in the Dominion a Parliamentary Matrimonial Court, to administer justice in matrimonial causes. To compel His Majesty's Roman Catholic subjects to submit their rights in regard to marriage to the adjudication of a purely Spiritual Court where the ultimate appeal lies to the Pope, would be virtually depriving them of one of their inalienable rights, viz., if they desire it, the King's Justice.

Mr. Justice Jetté, who finally disposed of the case of *Laramée* v. *Evans,* agreed with Papineau, J. He also

fortified his judgment by the quotation from the *Guibord* case, and considers also that their lordships of the Privy Council have affirmed the jurisdiction of Roman Catholic Bishops in Quebec. But he adds nothing to the reasons of Papineau, J., for coming to that conclusion. The merits of the judgment in this last case have not been discussed, as not being pertinent to the matter now under consideration, namely, whether the Quebec Civil Courts have any matrimonial jurisdiction: but it may be stated that in this case also the marriage of two Roman Catholics by a Methodist minister was dissolved, because a Roman Catholic Bishop had pronounced the marriage null and void on the ground of the alleged incompetence of the minister to solemnize the marriage of a Roman Catholic. In *Delpit* v. *Coté,* 20 Sup. Ct. R. 338, Archibald, J., declared that such a marriage was legal, without referring the question to any Ecclesiastical tribunal. But in *Durocher* v. *De Gré,* Ib. 456, the Court of Revision (Mathieu, Curran and Lemieux, J.J., affirming the judgment of Lynch, J.), determined that the marriage of the parties, who were Roman Catholics, having been solemnized by a Protestant minister, was null and void on the ground that it had been annulled by the decree of the Roman Catholic Bishop of St. Hyacinthe. The defendant allowed the case to go by default. In that case it also appeared that the parties had gone out of the Province in order, as the Court held, to evade the marriage law of Quebec, and for that reason also the marriage was held to be void under s. 135 of the Civil Code.

In none of the cases which have been referred to, was the question of the jurisdiction of the Court to entertain

matrimonial causes seriously argued, and its right to exercise jurisdiction seems to have been taken for granted. The judgment of Lemieux, J., in *Durocher* v. *De Gré,* is deserving of attention because he maintains that the law of marriage is part of the Civil Law, and that by the introduction of the laws of Canada, touching property and civil rights the Canadian law of marriage as it existed at the date of the Conquest of Canada was thereby introduced. But this argument, which I have dealt with *supra,* p. 18, *et seq.,* it may be remarked, does not justify the Civil Court in exercising matrimonial jurisdiction, but is really a conclusive argument against the right of the Civil Courts in Quebec so to do; because by the law of Canada the subject of matrimony, even if it was a civil right, was within the jurisdiction of the Spiritual Courts; and the Spiritual Courts existing at the time of the Conquest in so far as they had relation to, or recognition by the State in the temporal administration of justice, having came to an end by virtue of the Conquest; and such Spiritual Courts not having been re-appointed by the new Sovereign, and no other Courts having been established in their place, the conclusion seems to be inevitable, that this is a branch of law, even though it does involve civil rights, for the administration of which no tribunal has been appointed. This condition of affairs is paralleled by the fact that from 1792 until 1837 no Court of Equity existed in Upper Canada. Equitable rights arose, but there was no means of enforcing them. But in that condition of things the judges of the Court of King's Bench did not say. "It is true this is a Court of Law, and its jurisdiction is limited to administering

the law relating to legal rights, but we will refer equitable rights to some expert equity lawyer, and will then give judgment so as to give legal effect to his decision." But if they had done so, it would seem to be very like what some of the judges in the Province of Quebec have been doing for many years past; and the question is ought they to have done so? Is it within their province to delegate judicial duties to Roman Catholic Bishops, or any other private persons? have they power to create Courts because the State has failed to constitute them? And most important of all, have they power to deprive His Majesty's Roman Catholic subjects of their right of appeal to His Majesty, or to compel them to content themselves either with an appeal, contrary to 1 Eliz. c. 1, to his Holiness the Pope, or to submit to an unappealable decision on a question affecting their status before the law?

For a temporal Court to give, or purport to give, without statutory authority, a legal sanction to the decrees of what are in fact Papal Courts appears to be a plain violation of the Act of Supremacy.

These are grave questions, and concern not only the Province of Quebec, but all other provinces of the Dominion.

If it is said in such a case the Roman Bishop's judgment must prevail, it may be asked, where did the Roman Catholic Bishop acquire any superior authority or right to that of the Anglican Bishop? Where did he get any jurisdiction over Anglicans?

Why is the Anglican Bishop's sentence not as good in the eyes of the law, and indeed far more authoritative

than that of the Roman Catholic Bishop? He at least would be governed by the King's Ecclesiastical Law. The same argument applies to the Ecclesiastical Courts of other religious bodies, though, perhaps, with not quite the same force, because the Ecclesiastical Courts of those bodies have never had any temporal authority, whereas both Roman Catholic Bishops, and Anglican Bishops, were formerly recognized by the temporal authorities of France and England respectively as having judicial authority, and their decrees regarding marriage had a legal and binding effect. Such a scheme or theory as some of the judges in Quebec have been working on, if pursued to its legitimate conclusion, would only end in confusion, and, probably, ill will.

Some Protestant writers and ministers have somewhat too roughly criticized Roman Catholic Bishops for what they have done in Quebec in regard to marriages which have been in question in the Courts. They, of course, have been merely carrying out what they believed to be the law of their part of the Christian Church, but they cannot be properly held responsible, because judges of the temporal Courts of Quebec have chosen, as it would appear without lawful authority, to give a legal sanction to the decrees of Roman Catholic Bishops. The fault is not so much with the Bishop as with the judge who thus exceeds his jurisdiction. The Roman Catholic Bishops' fault appears to be this, that, quite innocently and excusably no doubt, they have failed to realize, that by reason of the disassociation of the State from the Church in Canada, the Courts of the Church have lost the jurisdiction which they formerly undoubtedly enjoy-

ed, and that they are no longer recognized by the State as a part of the machinery for the administration of justice in this country.

But notwithstanding this it cannot be denied that strictly Ecclesiastical Courts even now have the right to exercise within proper limits a jurisdiction over the conduct of those properly subject to their authority, but that authority must of necessity be confined to the exercise of spiritual censures and discipline, for they have ceased to have any coercive power.

For instance, as an illustration of the limits of their jurisdiction suppose the violation of what certain parts of the Christian Church regard as "God's Law," concerning the marriage of a man with his deceased wife's sister takes place; such marriages are not enjoined, or required by the State, but the State has withdrawn its prohibition against such marriages; if contracted, they are legal and have all the consequences of other legal marriages, but, for all that, they still remain violations of what is understood by some parts of the Christian Church to be "God's Law." The Spiritual authorities of those parts of the Church, however, which consider God's law is violated by such marriages have no right to presume to annul or dissolve such marriages; but they may very properly visit with spiritual censures and discipline those who contract them, in defiance of what is believed to be "God's Law." In like manner if the Roman part of the Church chooses to make a law, that all who profess the Roman faith shall be married by a Roman Priest, such a rule would only have force as a private domestic law of the Roman part of the Church. And if the temporal

authority allows all marriages, without exception, to be solemnized by any person authorized to keep a public register, then a marriage of Roman Catholics solemnized according to the requirements of the temporal law is legal and binding, notwithstanding the parties have violated the Ecclesiastical law, and no church or tribunal would have any legal right or power to annul it; but the Spiritual Courts of that part of the Church to which the parties belong might nevertheless visit the offenders with such spiritual censures or discipline as the occasion might require, and no one could well say they were exceeding their authority.

If it be the true position of affairs, that neither in Ontario, nor Quebec is there any duly constituted Court having matrimonial jurisdiction, is it not time that the defect should be remedied; and that the Dominion Parliament should supersede all existing Provincial Matrimonial Courts and establish one such Court for the whole Dominion?

For the establishing of such a Court and the defining of its jurisdiction and the law it is administer the Imperial Statute 20-21 Vict. c. 85, will no doubt furnish a sufficient guide.

POSTSCRIPT.

Since the foregoing was in press, judgment has been given by Mr. Justice Charbonneau in the *Hebert* case. In the result, upholding the validity of a marriage of two Roman Catholics by a Methodist minister, notwithstanding a decree of a Roman Catholic bishop purporting to annul it. With his decision, as far as the merits of the case are concerned, no fault is to be found; but if the position taken in the foregoing pages is correct, then, of course, it follows that though the judgment be absolutely correct in point of law, yet the learned judge had no jurisdiction to pronounce it. When discussing the alleged judicial authority of Roman Catholic bishops, the learned judge says:—"It must be noted that the annulling of the marriage is the exercise of judicial power; whether such exercise is called a decree or a judgment, it is to the same effect; *judicial power is a part of public authority, and can be conferred only by the law,* which entrusts the functions thereof to a certain class of citizens, acting *ex officio* and by the Crown, according to certain laws enacted by the legislative power to that effect. This authority is not here given in the code, nor in the laws preceding it as far back as the Conquest. As all judicial authority disappeared with the change of allegiance, it would be useless to go beyond the Cession to see what was the jurisdiction of the bishops

in such matters, or what was the officiality under the old French law."

His concluding remark as to the uselessness of inquiring as to the jurisdiction of bishops before the Cession may be open to question, but the general tenor of the above passage seems incontrovertible. But it is also obvious that what the learned judge says is equally applicable to the Court of which he is a member—and the question arises, Has the public authority, to which he refers, conferred on that Court (confessedly a civil court) any matrimonial jurisdiction whatever? If the arguments advanced in this book are sound, the answer must be in the negative; and therefore tested by the rule he has himself laid down, the learned judge himself had no more authority to adjudicate the case than had the Roman Catholic bishop.

As the Honorable the Minister of Justice has pointed out there are now five decisions of Quebec Courts declaring that the Court is bound to give legal effect to decrees of nullity of marriage pronounced by Roman Catholic bishops, and there are three decisions to the contrary. This conflict of judicial opinion is of itself a public inconvenience as it throws doubt and uncertainty on a question of general public interest and importance, which ought to be beyond the possibility of question.

There has also been published a statement of the questions to be submitted by the Government to the Supreme Court. These questions are stated to be the following:—"The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the Supreme Court Act, the

following questions be referred to the Supreme Court of Canada for hearing and consideration, namely: 1.—(*a*) Has the Parliament of Canada authority to enact, in whole or in part, Bill No. 3 of the first session of the twelfth Parliament of Canada, intituled, 'An Act to Amend the Marriage Act.' The bill provides as follows:—

1. The Marriage Act, chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—3. Every ceremony or form of marriage heretofore or hereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage,* notwithstanding any differences in the religious faith of the persons so married, and without regard to the religion of the person performing the ceremony.

(2) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage shall be absolute and complete, and no law or canonical decree or custom of or in any province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever.

(*b*) If the provisions of the said bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

*This makes no exception of cases where the parties are related within the prohibited degrees.

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such province?

(*a*) Between persons who are both Roman Catholics, or,—(*b*) between persons one of whom, only, is a Roman Catholic.

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages whether (*a*) heretofore solemnized, or (*b*) hereafter to be solemnized, shall be legal and binding?

It will be seen that none of these questions touch upon or deal with the important points which have been dealt with in this book.

With regard to question 1 it may be remarked that it seems to raise an immaterial issue. Even if answered in the affirmative it would not answer the question which is at the foundation of the objection to the Quebec decisions purporting to annul the marriages of Roman Catholics solemnized by Protestant ministers. Those decisions are based on the conclusion that according to the Quebec law as it now stands, a Protestant minister is incompetent to solemnize the marriage of Roman Catholics. The really vital question to be determined, therefore, is whether that is, or is not, a true exposition of the law of Quebec. If that is the law of Quebec, then the proposed Act would not make valid any marriage solemnized in that Province in a way contrary to the

law of that Province concerning solemnization, which is a matter confessedly within its jurisdiction.

Besides, if the marriage is solemnized according to the law of the Province, it does not require any Dominion legislation to give it validity.

The second question, however, covers one of the main points of controversy. For the word "contracted," however, in the first part of the question it is submitted the word "solemnized" should have been used, as is done in the concluding questions.

The second question appears to be somewhat involved. What is wanted to be ascertained I presume is (1) Whether the law of the Province of Quebec invalidates the marriages of Roman Catholics solemnized before persons authorized to solemnize marriage, but who are not priests of the Roman Catholic Church. Whether the law of Quebec requires, where both parties to a marriage are Roman Catholics, that their marriage shall be solemnized according to the laws of the Roman Catholic Church? Whether the law of Quebec requires where one of the parties to a marriage is a Roman Catholic that the marriage should be solemnized according to the laws of the Roman Catholic Church?

Is a marriage of Roman Catholics solemnized before a person authorized to solemnize marriages in Quebec, but not being a Roman Catholic priest, void according to the law of Quebec?

Is a marriage where one only of the spouses is a Roman Catholic, solemnized as above mentioned void according to the law of Quebec?

It seems to me, for the proper elucidation of the matrimonial law of Canada, that further questions should also have been submitted.

1. Has the High Court of Justice of Ontario any, and, if any, what jurisdiction in matrimonial causes (other than the right to grant alimony)?

2. Is the Act of the Province 1. Geo. 5, c. 32 (Ont.), ss. 29-34, *intra vires* of the Provincial Legislature?

3. Is there any, and if any, what, Court, in the Province of Quebec having any matrimonial jurisdiction? and if yea, then to what extent does its jurisdiction extend?

4. Can legal effect be given by any Civil Court in Quebec to the decrees or judgments of Roman Catholic Archbishops, or Bishops, purporting to annul any marriage in that Province, without a violation of the Act of Supremacy?

The Sacrament of Matrimony.

Note.—In the course of the discussion of the matters referred to in this work we are repeatedly reminded that according to the doctrine of the Roman part of the Church, Christian marriage is regarded, and spoken of, as being a "Sacrament."

In the "Marriage Laws of Canada" it will be seen that there are to be found citations from theologians of high repute in the Roman part of the Church in which it is laid down that the Sacrament of Marriage does not consist in any rite or ceremony, which is done or per-

formed by the priest who may solemnize the marriage, but it is administered by the parties to themselves, or each to the other: see Marriage Laws of Canada, pp. 16, 17.

We usually associate in our minds some act or thing done or given by the priest or minister as the "Sacrament," for instance, the sacrament of Baptism would by most people be considered to consist principally in the rite performed by the priest or minister. So also in the Holy Communion or the Mass, the "Sacrament" in most people's minds is considered to consist in the sacramental elements that are consecrated and given to the communicants.

But are not these so many instances of how a word by long usage gets away from its original meaning?

The word "Sacrament" as is well known is not a scriptural word, but one invented by theologians. It is evidently derived from the Latin word "Sacramentum" which meant the oath of fidelity taken by the ancient Roman soldier.

Now it is not very difficult to see how this word came to be applied to Christian ordinances. Those who first so applied it well knew its meaning, and to them the appropriateness of the word to the Christian ordinances to which it was applied must have been equally apparent.

The Christian is regarded as a soldier. When he is initiated into the Christian Faith he too must take or make his *sacramentum* that he will be faithful and bear true allegiance to Him whom he takes henceforth for his Master. In the Anglican part of the Church, and doubtless in others, this idea is beautifully brought out in the

Baptismal office.* In Confirmation the baptized renews his baptismal *sacramentum,* therefore Confirmation is a sacrament. He who enters the sacred ministry also makes his *sacramentum* of fidelity, therefore that also is a "Sacrament." At the Mass or Holy Communion the Communicant makes his solemn profession of Faith, and therefore that rite also is a sacrament. Penance and Unction for the same reason are also "Sacraments," and in Holy Matrimony the parties explicitly or implicitly make vows of fidelity to each other, and therefore that also is rightly enough called also a "sacrament."

The word "Sacrament" therefore was probably originally used in all cases to signify something done, not by the priest or minister, but by those who made their vows when taking part in any Christian rite or ordinance; and this is manifestly so in the case of marriage, and it seems equally manifest as to all other "Sacraments." But it is not pretended that this is a complete account of the doctrine of the Christian Church regarding sacraments. It is merely offered as a reasonable and probable explanation of how and why the word "Sacrament" came to be applied to marriage and other Christian ordinances.

This sacramental view of the marriage vow, seems necessarily to involve two results, viz.:

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*After the person is baptized, having first made in person, or by sponsors, profession of faith, the minister is directed to say,—"We receive this [child] into the congregation of Christ's Church and do sign [him] with the sign of the cross in token that hereafter he shall not be ashamed to confess the faith of Christ crucified, and *manfully to fight under His banner* against sin, the world and the devil, and to *continue Christ's faithful soldier and servant* unto [His] life's end:" Book of Common Prayer, Baptismal Office.

(1) That the vows once made between competent parties are irrevocable, and the contract is indissoluble.

(2) That the violation of this sacramental vow is not a mere breach of contract, but an act of sacrilege.

In this view of the matter we can understand the attitude of the 56 prelates at the Council of Trent who were of the opinion that the Council had no power to nullify so sacred an obligation, merely for the omission of solemnization before a priest, which the church had always previously held to be an unessential, though desirable, ceremony.

The civil law of Quebec has adopted the law of the Roman part of the Church that the marriage vows are indissoluble: Code Civil, s. 185.

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